Supreme Court, U.S.
FILED
FEB 11 2004
OFFICE OF THE CLERK

(2)

No. 03-1027

In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

TABLE OF CONTENTS

		Page
A.	This Court should review the court of appeals' holding that the President lacks authority to seize and detain Padilla as an enemy combatant	2
B.	The court of appeals' opinion does not raise any issues concerning the extent to which Padilla may raise a factual challenge to the determination that he is an enemy combatant	6
C.	This Court should review the court of appeals' conclusion that the district court has jurisdiction over the proper respondent to the amended habeas petition	8

TABLE OF AUTHORITIES

Cases:

Braden v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973) 9
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 7
Federal Energy Admin. v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976) 8
Hamdi v. *Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), cert. granted, 124 S. Ct. 981 (2004) 2, 4, 5
Monk v. *Secretary of the Navy*, 793 F.2d 364 (D.C. Cir. 1986) 9, 10
Quirin, Ex parte, 317 U.S. 1 (1942) 1, 3, 5, 6
Ralston v. *Robinson*, 454 U.S. 201 (1981) 7
Robledo-Gonzales v. *Ashcroft*, 342 F.3d 667 (7th Cir. 2003) 10
Strait v. *Laird*, 406 U.S. 341 (1972) 9
Vasquez v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001) 9

Statutes and regulations:	Page
Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224	1, 5, 6
§ 2(a), 115 Stat. 224	5
Emergency Detention Act of 1950, 50 U.S.C. 811 *et seq.*	4
10 U.S.C. 821	3
18 U.S.C. 4001(a)	1, 4, 5
28 U.S.C. 2241	9
Miscellaneous:	
Robert L. Stern, et al., *Supreme Court Practice* (8th ed. 2002)	8
U.S. Department of Defense, *Padilla allowed access to lawyer* (Feb. 11, 2004) <http://www.defenselink.mil/releases/2004/nr20040211-0341.html>	7

REPLY BRIEF FOR THE PETITIONER

Respondent recognizes that this case involves issues "of great national significance" (Br. in Opp. 10), but contends that certiorari nonetheless should be denied, principally on the ground that the court of appeals' decision is correct. Respondent is mistaken. As explained in the petition (at 12-18), the court of appeals' opinion is fundamentally flawed in a number of respects, including in its reading of this Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), and in its interpretation of both 18 U.S.C. 4001(a) and Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224. In any event, there is no question that the opinion raises issues of extraordinary national significance requiring this Court's review.

The President, acting as Commander in Chief in a time of war, determined that Jose Padilla is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," that he has "engaged in conduct that constituted hostile and war-like acts," that he possesses intelligence that "would aid U.S. efforts to prevent attacks by al Qaeda," that he "represents a continuing, present and grave danger to the national security," and that "it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant." Pet. App. 57a-58a. The court of appeals, in an unprecedented ruling, nullified the President's core wartime judgment as Commander in Chief and ordered Padilla's release from military control. That decision manifestly requires review by this Court, as this Court has indicated by granting certiorari on related issues in *Hamdi* v. *Rumsfeld*, No. 03-6696, cert. granted, 124 S. Ct. 981 (2004). The Court should grant certiorari in this case and schedule it for separate argument

on the same day that *Hamdi* is argued.[1] The Court should also review the court of appeals' conclusion in this case that jurisdiction over the amended petition properly lies in the Southern District of New York.[2]

A. This Court Should Review The Court Of Appeals' Holding That The President Lacks Authority To Seize And Detain Padilla As An Enemy Combatant

1. The President made a determination "for the United States of America" that Padilla's detention as enemy combatant is "necessary to prevent him from aiding al Qaeda," is "in the interest of the United States," and is "consistent with U.S. law and the laws of war." Pet. App. 57a-58a. The court of appeals, in the face of the President's determination, ordered Padilla's release. Such a ruling, by its nature, raises issues of extraordinary significance warranting this Court's review. Accordingly, respondent's arguments that the court of appeals' decision is correct on the merits (Br. in Opp. 11-17) do not diminish the need for review by this Court. Those arguments are mistaken in any event.

a. Respondent acknowledges the military's settled wartime authority to capture and detain enemy combatants, but contends that the authority only encompasses combatants seized "on the battlefield." Br. in Opp. 16. That argument is foreclosed by this Court's decision in *Ex parte Quirin*, which upholds the military detention and trial by military commission of a group of enemy combatants—including one presumed to be an American citizen—seized by FBI agents in Chicago and New York.

[1] In the court of appeals, respondent filed an application for an interlocutory cross-appeal on the question whether the President has authority to detain Padilla as an enemy combatant, arguing that the question was "novel and complex" and that there were substantial grounds for a difference of opinion on the issue. C.A. App. 193-194.

[2] On January 22, 2004, the court of appeals granted petitioner's motion to stay the court's mandate pending this Court's final disposition of the petition for a writ of certiorari.

The *Quirin* Court specifically rejected the suggestion that the combatants were "any the less belligerents if * * * they have not actually committed or attempted to commit any act of depredation *or entered the theatre or zone of active military operations*." 317 U.S. at 38 (emphasis added). The Court explained that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents." *Id.* at 37-38. Padilla fits squarely within that category according to the terms of the President's determination: the President found that Padilla is "closely associated with al Qaeda," that he has engaged in "hostile and war-like acts," and that his detention is "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." Pet. App. 57a-58a.

Respondent nonetheless submits that *Quirin* "provides no support for Padilla's detention" (Br. in Opp. 17), arguing that *Quirin* involved congressional authorization that is absent here. The *Quirin* saboteurs were tried pursuant to Articles of War providing for trial by military commission of offenses against the laws of war, see 317 U.S. at 26-28, 36, and the relevant provisions remain in effect today, see 10 U.S.C. 821. Although Padilla, unlike the *Quirin* saboteurs, has not been charged with specific war crimes, the Court's opinion makes plain that *all* enemy combatants "are subject to capture and detention * * * by opposing military forces," regardless of whether the combatants "*in addition* * * * are [made] subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 31 (emphasis added).[3]

[3] Respondent observes that the combatants in *Quirin* acknowledged that they were members of the German forces. Br. in Opp. 17. But the court of appeals in this case held that the President lacks authority to de-

Respondent's effort to confine the President's authority to combatants seized on a foreign battlefield is decidedly out of place in the context of the current conflict against al Qaeda. As is starkly illustrated by the nature of the savage attacks of September 11, 2001, al Qaeda has extended the battle far beyond traditional notions of battlefield combat and aims to perpetrate surreptitious and large-scale attacks against civilian targets well outside any conventional zone of combat. Particularly in view of the nature of the current conflict, there is no basis for nullifying the authority recognized by *Quirin* for the military to seize and detain enemy combatants wherever found.

b. Respondent also errs in arguing (Br. in Opp. 11-15) that 18 U.S.C. 4001(a) bars Padilla's detention as an enemy combatant. Respondent makes no suggestion that Section 4001(a) could prohibit the detention of an American citizen seized while fighting against the United States in the course of conventional battlefield combat. See *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 467-468 (4th Cir. 2003), cert. granted, 124 S. Ct. 981 (2004). Nothing in the statutory terms—which purport to regulate detentions, not place of capture—supports a different result in the circumstances of this case. The statute, properly construed, does not pertain to the wartime detention of enemy combatants at all. Moreover, construing the statute to constrain the President's basic authority to capture and detain enemy combatants would raise serious separation-of-powers concerns. See Pet. 17-18.[4]

---

tain Padilla on the assumption—as is described in the Mobbs Declaration—that Padilla trained with al Qaeda and came to the United States intending to advance the conduct of further hostile actions by al Qaeda.

[4] Respondent stresses that 18 U.S.C. 4001(a) "repealed a statute that specifically concerned detention of spies and saboteurs in time of war," Br. in Opp. 13, but does not mention that the statute, the Emergency Detention Act of 1950, 50 U.S.C. 811 *et seq.*, gave that authority to the Attorney General. See Pet. 17 n.6. That fact, along with the statute's location in Title 18, underscore that it limits detention by civilian officials, not the wartime detention of enemy combatants by the military.

In any event, Congress's Authorization for Use of Military Force supplies an ample statutory basis for Padilla's detention. Although respondent suggests that Congress did not intend to support the detention of a combatant "seized outside a zone of combat" (Br. in Opp. 15), the statutory terms contain no suggestion that the President lacks authority outside the context of conventional battlefield combat. To the contrary, Congress acted in direct response to attacks carried out far from any traditional zone of combat, Congress specifically found it "necessary and appropriate * * * to protect United States citizens both *at home* and abroad," and Congress recognized the President's authority "to take action to *deter* and *prevent* acts of international terrorism against the United States." 115 Stat. 224 (emphasis added). Padilla's detention thus falls comfortably within the broad terms of Congress's Authorization. See *Quirin*, 317 U.S. at 26 ("The Constitution * * * invests the President, as Commander in Chief, with the power to * * * carry into effect all laws passed by Congress for the conduct of war.").[5]

2. Respondent contends (Br. in Opp. 17-18) that the court of appeals' ruling is narrow and works no interference with

---

[5] Respondent goes so far as to argue (Br. in Opp. 15 n.10, 18) that Padilla's detention falls outside the scope of Congress's Authorization because Padilla *himself* did not "plan[], authorize[], commit[], or aid[] the terrorist attacks that occurred on September 11, 2001," § 2(a), 115 Stat. 224. That argument is specious. Congress supported the President's use of force against, *inter alia*, "organizations" that "he determines planned, authorized, committed, or aided" the September 11 attacks (*ibid.*), and al Qaeda indisputably is such an "organization." Of course, "[o]rganizations such as al Qaeda are comprised of people," Pet. App. 70a (Wesley, J., dissenting), and the President determined that Padilla is "closely associated" with al Qaeda and has engaged in "hostile and war-like acts," *id.* at 57a, making clear that Padilla falls within the sweep of Congress's Authorization. See *id.* at 68a-70a (Wesley, J., dissenting).

the President's ability to preserve the national security in wartime. That argument is unavailing. The President made a determination as Commander in Chief that Padilla "represents a continuing, present and grave danger to the national security," and that "it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant." Pet. App. 58a.

Respondent emphasizes (Br. in Opp. 18) that Padilla was not engaged in imminent hostilities at the moment of his initial seizure and was already detained by law enforcement before his transfer to military control. But the *Quirin* saboteurs likewise had been taken into custody by FBI agents before being transferred to military control, 317 U.S. at 21-23, and this Court made clear that it was immaterial whether they had "actually committed or attempted to commit any act of depredation" when they were initially seized, *id.* at 38. There thus is no basis for requiring the military to wait to seize an enemy combatant who has "engaged in conduct that constituted hostile and war-like acts" (Pet. App. 57a) and aims to aid the enemy in its efforts to attack the United States. Moreover, the President determined that Padilla possesses "intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States." *Id.* at 57a-58a. The prospect of Padilla's transfer to civilian authorities in lieu of an outright release (see Br. in Opp. 18) thus in no way detracts from the President's determination that the national interest requires Padilla's detention as an enemy combatant.

B. The Court Of Appeals' Opinion Does Not Raise Any Issues Concerning The Extent To Which Padilla May Raise A Factual Challenge To The Determination That He Is An Enemy Combatant

Respondent submits (Br. in Opp. 19-23) that, if the Court grants certiorari, it should extend its review beyond the

questions presented by the petition to address the extent to which Padilla may challenge the factual basis for the President's determination that he is an enemy combatant, including the standards of review for any such challenge and whether Padilla would be entitled to meet with counsel. Those issues are not properly presented by the court of appeals' decision. The court of appeals accepted the factual basis for Padilla's detention laid out in the Mobbs Declaration, and it ruled as a matter of law that the President lacks authority under those facts to detain Padilla as an enemy combatant. The court therefore explained that its decision "effectively moots arguments * * * concerning access to counsel, standard of review, and burden of proof." Pet. App. 4a n.1.[6]

This Court's usual practice is to confine its review to questions squarely raised by the opinion below rather than reaching out to resolve issues left unaddressed by the decision under review. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) ("we do not ordinarily consider questions not specifically passed upon by the lower court"); *Ralston* v.

---

[6] As counsel for petitioners explained during oral argument before the court of appeals in November 2003, the Department of Defense (DOD), as a matter of discretion and military policy, has adopted a policy of permitting access to counsel by an enemy combatant who is a United States citizen and who is detained by the military in the United States, when DOD has determined that such access will not compromise the national security of the United States, and when DOD has determined either that it has completed intelligence collection from the enemy combatant or that granting access to counsel would not interfere with such intelligence gathering. See 11/17/03 Tr. 82-84, 113, 123-124. In accordance with DOD's policy and the military's ongoing evaluation of Padilla's detention, DOD has determined that Padilla may be permitted access to counsel subject to appropriate security restrictions. See http://www.defenselink.mil/releases/2004/nr20040211-0341.html. That decision, along with the Second Circuit's own recognition that its broad ruling rendered arguments concerning access to counsel "effectively moot," counsel in favor of confining review to the questions presented in the petition.

Robinson, 454 U.S. 201, 220 n.14 (1981). Adherence to that practice is especially warranted where, as here, the Court is asked to decide sensitive and complex issues that have yet to be addressed by any court of appeals. Moreover, because the court of appeals invalidated Padilla's detention as a matter of law and ordered his release, Pet. App. 3a, 55a, any ruling by this Court on the extent to which Padilla may challenge the factual basis for the determination that he is an enemy combatant could result, at most, in modification (rather than affirmance) of the judgment below. And "[a]n argument that would modify the judgment even in a way that provides less relief cannot be presented without filing a * * * cross-petition," which respondent has not done. Robert L. Stern, et al., *Supreme Court Practice* 444 (8th ed. 2002); see *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). The Court thus should decline respondent's invitation to resolve issues not addressed by the court of appeals' decision, and should limit the grant of certiorari to the questions presented in the petition.[7]

C. This Court Should Review The Court Of Appeals' Conclusion That The District Court Has Jurisdiction Over The Proper Respondent To The Amended Habeas Petition

As the petition explains (at 21-28), the court of appeals' holding that the district court properly asserted habeas jurisdiction in this case is inconsistent with decisions of other

[7] Respondent "concurs with the Government that the Court should grant the petition [in this case] rather than hold it pending the Court's decision in *Hamdi*." Br. in Opp. 29. Because the issues in the two cases are related, the petition, at a minimum should be held pending the disposition in *Hamdi*. As the petition explains, however (at 20), the issues are sufficiently distinct that the Court should grant the petition here and schedule this case for separate oral argument on the same day as argument in *Hamdi*.

courts of appeals and should be reviewed by this Court. Respondent's arguments against review are unpersuasive.

1. A long line of decisions establishes that the proper respondent in a habeas challenge to present physical confinement is the detainee's immediate custodian. See Pet. 21-26. Respondent submits (Br. in Opp. 25) that this Court's decisions in *Strait* v. *Laird*, 406 U.S. 341 (1972), and *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), demonstrate a more flexible approach. But *Strait* did not involve a challenge to physical detention and hence involved no physical custodian, see 406 U.S. at 344; and in *Braden*, the detainee challenged a detainer lodged against him by another jurisdiction rather than his present physical confinement, 410 U.S. at 499-500. Accordingly, courts of appeals other than the Second Circuit below have viewed *Strait* and *Braden* as casting no doubt on the applicability of the immediate custodian rule in a typical habeas action challenging present physical confinement. As noted in the petition (at 25-26), therefore, the extent to which *Strait* and *Braden* permit deviating from the immediate custodian rule is the subject of disagreement among the courts of appeals. See *Vasquez* v. *Reno*, 233 F.3d 688, 695-696 (1st Cir. 2000) (*Strait* "cannot plausibly be read * * * to consign to the scrap heap the substantial body of well-reasoned authority holding that a detainee must name his immediate custodian as the respondent."), cert. denied, 534 U.S. 816 (2001); *Monk* v. *Secretary of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986) (holding that "[n]othing in *Braden* supports" departing from immediate custodian rule).

The factual distinctions raised by respondent are immaterial. Respondent observes (Br. in Opp. 26) that the government elected to detain Padilla at the Naval Consolidated Brig, Charleston, South Carolina. But the government also determines where to detain prisoners in criminal confinement, and it is undisputed that the immediate custodian rule

governs habeas actions brought by prisoners under 28 U.S.C. 2241. Respondent also emphasizes (Br. in Opp. 26) that Secretary Rumsfeld, rather than Padilla's immediate custodian, has independent authority to determine when Padilla's detention will terminate. No immediate custodian has such authority, however (see Pet. 24-25), yet courts consistently adhere to the immediate custodian rule. See *Robledo-Gonzales* v. *Ashcroft*, 342 F.3d 667, 673 (7th Cir. 2003) (detainee must name immediate custodian as respondent rather than supervisory official who has "power to control some aspect of the petitioner's legal process").

2. As the petition explains (at 21, 26-27), the habeas statutes direct that a district court has jurisdiction over a petition only if the respondent is located within the district's territorial boundaries. Respondent argues (Br. in Opp. 27-28) that *Braden* establishes that jurisdiction in a habeas case extends to any custodian who can be reached by the long-arm statute of the State in which the district court sits. That contention cannot be squared with the view of the D.C. Circuit, which has held that *Braden* affords no basis for departing from the rule that habeas "jurisdiction is proper only in the district in which the immediate * * * custodian is located." *Monk*, 793 F.2d at 369. Respondent does not discuss that decision or deny that it is inconsistent with the opinion below.

* * * * *

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

FEBRUARY 2004